

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4196

In The
United States Court of Appeals
For The Second Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

ELMSFORD SHEET METAL WORKS, INC.,
Intervenor,

vs.

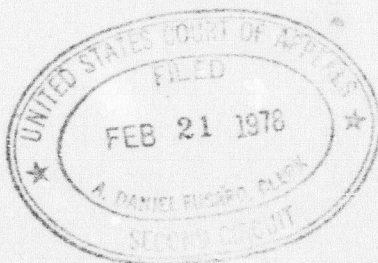
SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 38,

Respondent.

*On Application for Enforcement of an Order of the National
Labor Relations Board*

**BRIEF FOR RESPONDENT, SHEET METAL
WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 38**

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IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit
No. 77-4196

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
ELMSFORD SHEET METAL WORKS, INC.,
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v.
SHEET METAL WORKERS INTERNATIONAL
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Respondent.

On Application for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR RESPONDENT,
SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 38

Statement Of Issues Presented

1. Whether the Board's findings, that the Local insisted to impasse on the inclusion in the parties' new

contract proposals about interest arbitration and industry promotion funds, are supported by substantial evidence.

2. Whether the Board properly found that interest arbitration is a nonmandatory subject of bargaining.

3. Whether the Board properly found that industry promotion funds is a nonmandatory subject of bargaining.

4. Whether the Board properly found that the Local restrained and coerced the Employer in the selection of its bargaining representative, within the meaning of Section 8(b)(1)(B) of the Act.

Statement of the Case

This case is before the Court upon the petition of the National Labor Relations Board ("Board") for enforcement of its order issued against Sheet Metal Workers International Association, Local Union No. 38 ("Local"), dated August 29, 1977. The Local's answer puts in issue certain factual findings and the Board's legal conclusions, as noted above.

The Board's decision is reported at 231 N.L.R.B. No. 101 and shows a marked division between the three-member majority and the two members of the Board who dissented on the issues presented in this case (App. 73-94).

This Court has jurisdiction of the proceeding under Section 10(e) of the National Labor Relations Act, as amended, ("Act"), 29 U.S.C. Section 151, et seq.

The Majority's Findings

Three members of the Board found that the Local violated Section 8(b)(3) of the Act by insisting to impasse in collective bargaining negotiations with Elmsford Sheet Metal Works, Inc. ("Employer") on two topics which the Board also found to be nonmandatory subjects of bargaining (App. 77). The two topics at issue are an interest arbitration proposal and proposals for national and local sheet metal industry promotion funds.

The three-member majority also found that the Local's conduct amounted to restraint of the Employer in its choice of a bargaining representative within the meaning of Section 8(b)(1)(B) of the Act (App. 79).

The Dissents

Contrary to their three colleagues, Chairman Fanning and the previous Chairman, Member Murphy, found no violations of Section 8(b)(3) or 8(b)(1)(B) of the Act and would have dismissed the entire complaint (App. 84-89).

The Facts

The Employer, for more than twenty-five years, was a member of the Sheet Metal and Roofers Employer's Association of Southeastern New York, Inc. ("Association"). the Association engaged in collective bargaining on behalf of the Employer and its other employer members with the Local (App. 74). During the summer of 1975, the Employer attempted to remove itself from the multi-employer bargaining unit (App. 16, 47-48). The Employer's attempted withdrawal from the bargaining unit may not have been successful, since its first attempt (App. 16) occurred after the Association had commenced negotiations for a new agreement, and its second attempt (App. 47-48) occurred after the Association had executed a new collective bargaining agreement.

In any case, the Local acquiesced in the Employer's desire to be free of the Association and on

September 18, 1975 the Local and the Employer executed a collective bargaining agreement, effective from July 1, 1975 to June 30, 1976 (App. 17-47). This agreement contained Article VIII, Section 12(b) (App. 19), providing for contributions by the Employer to the Sheet Metal and Air Conditioning Contractors' National Industry Fund; Article VIII, Section 13(b) (App. 20), providing for contributions by the Employer to the Sheet Metal Industry Fund of Westchester and Vicinity, and Article X, Section 8 (App. 22), providing for the resolution of deadlocks in negotiating new agreements through arbitration.

The Employer gave the Local timely notice of its desire to negotiate a new collective bargaining agreement on or about March 28, 1976 (App. 49). On May 11, 1976, the Employer and the Local met to negotiate an agreement to replace the then-current contract. The parties met again on June 7, 1976, August 30, 1976 and September 7, 1976. The result of these negotiating sessions was that the parties reached agreement on all issues, except for the Employer's demand to eliminate payments to the National and Local Industry Funds and to eliminate the interest arbitration provisions (App. 64-65).

On September 10, 1976, the Local submitted the unresolved issues between it and the Employer to the

National Joint Adjustment Board for the sheet metal industry, pursuant to Article X, Section 8 of the then-current agreement (App. 66-67). The National Joint Adjustment Board decision, issued on November 11, 1976 (App. 68-69), directed the inclusion of the three disputed items in the agreement to be reached by the parties. The Employer refused to abide by the National Joint Board's decision and on November 24, 1976 the Local informed the Employer that their collective bargaining agreement, still in force by virtue of Article XIII, Section 4 (App. 23), was terminated (App. 70).

On November 20, 1976 the Local requested its members employed by the Employer to attend a union meeting on December 1, 1976, instead of reporting to work (App. 71). The Board, without discussion, found this action to be a threatened strike designed to coerce the Employer into accepted the three disputed contract provisions (App. 79). The Local has at all times contended that the purpose of the meeting was to inform the employees of the status of the negotiations with the Employer and also to inform them why they had not received the wage increase received by all other members of the Local. An amended complaint was never issued alleging that the Local had threatened to strike and the only evidence before the Board on this

issue was two letters written by the parties (App. 71-72). In any case, the meeting was cancelled and the men reported to work at the Employer's plant, as scheduled.

Thereafter, on or about December 20, 1976 the Employer and the Local executed an agreement incorporating by reference all the terms and conditions of the current Association agreement, except for Article VIII, Sections 12 and 13 and Article X, Section 8. The letter agreement provides that the inclusion or exclusion of these provisions will depend on the legal resolution of the three sections.

The Board's Order

The Board's order (App. 80-83) requires the Local to cease insisting on the inclusion in an agreement of the three proposals in question; to cease insisting on compliance by the Employer with the award of the National Joint Adjustment Board; to bargain with the Employer in the manner dictated by the Board; and to post the usual notices.

ARGUMENT

- I. The Majority's Findings that the Local Insisted to Impasse on the Inclusion in the Parties' New Contract of Proposals About Interest Arbitration and Industry Promotion Funds Are Not Supported by Substantial Evidence

Throughout the negotiations the Local sought to have an interest arbitration clause, Article X, Section 8 (App. 22), included in the agreement. When the Local submitted this unresolved issue to the National Joint Adjustment Board, it was simply acting in accordance with its existing contractual obligations. See Winston-Salem Printing Pressmen v. Piedmont Publishing Co., 393 F.2d 221 (4th Cir. 1968); Nashville Newspaper Printing Pressmen v. Newspaper Printing Corp., 518 F.2d 351 (6th Cir. 1975). Under the rules of the National Joint Adjustment Board anything less than a unanimous decision would have put the parties back where they were before the submission; see decision of Administrative Law Judge, affirmed by the Board, Sheet Metal Workers Local 59, 227 N.L.R.B. No. 90 (1976). There is nothing in the record in this matter which shows that the Local would not have then, in that event, agreed to execute a collective bargaining agreement which did not include one or

more of the disputed proposals; yet, the Board cites the submission to the National Joint Adjustment Board as evidence of an impasse.

It is undisputed that the three proposals in question are legal subjects of bargaining. See NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 142 (1958). Equally, the Employer insisted that the next agreement not contain the disputed provisions. Certainly, the submission by the Local to the National Joint Adjustment Board did not mean that the Local was ending the bargaining. In fact, it is clear that the Employer did not even consider itself bound by any decision of the National Joint Adjustment Board (App. 64-65). Yet, the minutes of the last negotiating session (App. 64-65) indicate no request by the Employer to continue the negotiations. Indeed, the Employer breaks off the negotiations by promising to take the matter to the National Joint Adjustment Board.

The only item of evidence in the record that could be construed as an attempt to enforce the National Joint Adjustment Board's decision, rather than engage in further bargaining, is the letter of November 24, 1976 from the Local to the Employer (App. 70). Such a construction is erroneous. The letter is an assertion

by the Local that the negotiations had been severed by the Employer's conduct and thus, the collective bargaining agreement, by its own terms, was at an end. The letter does not show any unwillingness on the part of the Local to continue the negotiations.

The record is insufficient to support a finding that the Local made the inclusion of the interest arbitration clause and the industry promotion fund clauses a condition of reaching an agreement. The record does show that:

- (1) the Local bargained about the inclusion of an interest arbitration clause and the industry promotion fund clauses;
- (2) the Employer did not consider itself bound by any decision of the National Joint Adjustment Board (App. 64-65);
- (3) the Employer, not the Local, seems to have been responsible for the termination of the negotiations (App. 64-65); and
- (4) the Local did not at any time refuse to continue the negotiations.

The Board's findings must be supported by substantial evidence on the record considered as a whole,

Universal Camera v. NLRB, 340 U.S. 474 (1951). Even a glance at the majority opinion shows that it is unsatisfactory. There is no discussion of the relevant evidence; only flat findings set forth in exactly one sentence.

"Here, Respondent's demand for both of these subjects resulted in the issuance of an NJAB decision in which Elmsford refused to participate, and subsequently refused to recognize, the Respondent's assertion that it was no longer in signed agreement with Elmsford because of Elmsford's refusal to recognize the NJAB decision, and Respondent's threat to strike if Elmsford did not agree to the NJAB decision requiring the inclusion of the disputed provisions in the new bargaining agreement." (App. 79).

There is no discussion of the conduct of the parties during the negotiations. Not a word about the Local's constant contention that the NJAB proceeding seemed to have no affect on the Employer and was a previously agreed-upon continuation of the bargaining; see Mechanical Contractors Ass'n of Newburgh, 202 N.L.R.B. 1 (1973), where the Board found that a body very much like the NJAB simply continues the bargaining of the parties. Neither is there any evidence cited which indicates that the Local would never execute an agreement without the proposals in question. All the Board offers is one conclusional sentence.

The Board's failure here cannot be cured by

the General Counsel's marshalling of inferences in its appellate brief. In such circumstances where the Board has specified the record and offered neither evidence, reasons nor explanations, the Court of Appeals must examine the Board's decision and the record to determine if substantial evidence in the record supports the Board's conclusion that an impasse was reached.

Such an examination reveals that the Board's conclusion on impasse is not supported by substantial evidence. The Local did not refuse to continue negotiating. The Local did not threaten to strike. There was no impasse; there was no violation of Section 8(b)(3).

II. The Board Improperly Found that
Interest Arbitration is a Non-
mandatory Subject of Bargaining

Whether an interest arbitration clause is a permissive subject of bargaining or a mandatory subject only becomes important if it is found that the Local insisted on such a clause to impasse, since both types of subjects may be included in bargaining, provided that permissive subjects are not pushed to impasse, NLRB v. Wooster Div. of Borg-Warner Corp., supra.

The view of the majority of the Board, as expressed in this matter and other, such as Sheet Metal Workers Local 59, supra, is that an interest arbitration clause does not directly relate to wages, hours and terms and conditions of employment and so is not a mandatory subject of bargaining. It is stated that such a clause applies "only to the processes available to the parties in the event they could not reach agreement as to the terms of a future contract." Sheet Metal Workers Local 59, 94 L.R.R.M. at 1603. The analysis ignores the actions and relationship of the parties. The interest arbitration clause was, in 1975, agreed upon by the parties and accepted by them as part of the collective bargaining process. By its acceptance the employer

bargained away its right to lock out in exchange for the Local's relinquishment of its right to strike. Certainly, a clause which may be determinative of whether or not a strike may occur must be considered a condition of employment. Certainly, a clause which determines whether or not employees may be locked out of their jobs is a condition of their employment. A strike or a lockout affects every term and condition of employment.

The approach of the three-member majority, if accepted by this Court, will encourage resolution of disputes through economic contest. Section 8(d) of the Act encourages settlement of contract modification disputes by means other than a strike. The Supreme Court has stated that Section 8(d) is "designed to regulate modifications...so as to facilitate agreement in place of economic warfare...without interrupting the flow of commerce or the production of goods." Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971). This policy of encouraging peaceful dispute resolution includes interest arbitration arrangements, Seltzer & Co. v. Livingston, 253 F. Supp. 509 (1966), aff'd, 361 F.2d 218 (2d Cir. 1966); Winston-Salem Printing Pressmen v. Piedmont Publishing Co., supra; Builders Association of Kansas City v. Greater Kansas City Laborers, 326 F.2d 867

(8th Cir. 1964), cert. denied, 377 U.S. 917 (1964);
Nashville Newspaper Printing Pressmen v. Newspaper
Printing Corp., supra.

The parties to the contract in 1975 agreed that all outstanding issues between them, both grievances and contract provisions, shall be settled by quasi-judicial means, rather than raw economic force. This idea corresponds to established Federal labor policy with respect to peaceful settlement of contract grievance disputes. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). It also corresponds with established Board policy in other areas, such as Midwest Piping Co., Inc., 63 N.L.R.B. 1060 (1945), which provides for the quasi-judicial settlement of conflicting representation claims, rather than settlement of the issue by the employer or the economic muscle of one of the competing unions.

The Court should not be disturbed that an interest arbitration clause may become self-perpetuating. Certainly, this disturbed the Fifth Circuit in NLRB v.

Columbus Printing Pressmen, 543 F.2d 1161 (5th Cir. 1976).

The Court should recognize that the parties voluntarily entered into the agreement containing the interest arbitration clause and understood at the time its far-reaching consequences. There was no fraud involved and none is alleged. We do not believe that the provision is so inimicable to the public welfare that it must be struck down as in violation of public policy. Any issue which results in a three-to-two split among Board members can hardly qualify as so clearly contrary to public policy as to be stricken on that ground. Indeed, there is no reason to believe that this provision would not be upheld if this suit came before this Court in the posture of an appeal from a breach of contract suit under 29 U.S.C. Section 301.

Chairman Murphy, dissenting from the Board's decision in that case, Columbus Printing Pressmen, 219 N.L.R.B. 268 (1975), stated that:

"[T]here is nothing inherently unlawful about this when it results from the voluntary agreement of the parties. The individuals drafting such clauses surely are capable of adopting language which permits unilateral determination on whether to retain the same provision in later contracts and if the parties have agreed upon interest arbitration without qualification there is nothing inherently improper in seeking adherence thereto." 219 N.L.R.B. at 275.

In short, this Court is urged to conclude, along with Member Murphy dissenting in the instant matter (App.,85-86) that:

"Any issue which settles an aspect of the relationship between the employer and employees concerning wages, hours, working conditions, or other terms or conditions of employment is a mandatory subject of bargaining. That an interest arbitration provision does so is beyond dispute, for by its very nature it provides a peaceful judicial-type procedure in place of economic warfare as a means of settling any such aspect of the employment relationship upon which there may be disagreement. Its provision for the continuing effectiveness of established contract terms throughout the negotiation period for renewal thereof and the assurance of continued employment to workers and uninterrupted production to the employers are the very essence of the bargaining relationship and the protection of employer-employee interests. Further, the subject matter of bargaining must reflect the changing conditions of industrial society and the changing needs and responsibilities of labor and management. I am persuaded that interest arbitration does reflect such conditions and advances public policy favoring the voluntary resolution of disputes and the avoidance of economic warfare. In my view, it clearly is the collective-bargaining tool of the future, and I am surprised by the unwillingness of my colleagues to find it a mandatory subject of bargaining."

Interest arbitration clauses are consistent with the established labor policy of the United States, as expressed by the National Labor Relations Act and decisions interpreting that Act. As devices for preventing strikes and preventing obstructions of commerce, they should be favored and accorded the status of a mandatory subject of bargaining.

III. The Board Improperly Found that
Industry Promotion Funds Is a
Nonmandatory Subject of Bargaining

The majority of the Board found that the Local failed to bargain, and violated Section 8(b)(3) of the Act, by conditioning an agreement upon the inclusion of clauses providing that the Employer make contributions to the Westchester and the National Industry Funds. The majority believes these topics are nonmandatory subjects of bargaining (App. 79). The Local did seek to bargain about contributions to the Industry Funds and did submit this issue to the National Joint Adjustment Board. As stated in Point I herein, the Employer did not consider itself bound by any decisions of the National Joint Adjustment Board (App. 64-65). Furthermore, it was the Employer, not the Local, that broke off the bargaining (App. 64-65). Thus, the Local should not be found to have conditioned reaching an agreement upon the inclusion of clauses providing for payment to the Industry Funds. It wanted those provisions but there is no evidence to show that it would not have signed an agreement if the Employer had offered a reasonable alternative. The Employer was seeking a "free ride" to derive the benefits of the work of the Industry Funds without paying a fair share of the expenses. It made no offer of a like

expenditure for a different purpose. Notwithstanding this evidence, a majority of the Board found an impasse and it becomes necessary to examine whether contributions to industry funds, such as are in issue here, is a mandatory subject of bargaining.

The purpose of the National Industry Fund, provided for in Article VIII, Section 12 of the agreement, is "to promote programs of industry education, training, negotiation and administration of collective bargaining agreements, research and promotion of such programs serving to expand the market for the services of the sheet metal industry, improve the technical and business skills of employers, stabilize and improve Employer-Union relations and promote, support and improve the employment opportunities for employees."

(App. 26) The Westchester Industry Fund, established by Article VIII, Section 13 of the agreement, has a similar purpose (App. 27). Both Funds are dedicated to increasing the amount of work available to sheet metal contractors and employees employed by them. It must be recognized that many construction contractors attempt to find work in areas other than their home areas. Thus, the Local and National Industry Funds attempt to improve the ability of sheet metal employers, like the

Employer in the instant matter, to find jobs in many locations. The fact that the Employer may not belong to certain employer associations does not diminish the value of the Funds to it because the Funds promote the industry as a whole, not any particular employers.

If the Funds are able to promote sheet metal business, obviously, there are more job opportunities for sheet metal workers represented by the Local. What could have a more direct affect on terms or conditions of employment than having or not having a job? The Local believes and logic supports the position that the National and Local Industry Funds increase sheet metal worker employment. The Board has not made any showing of evidence to the contrary. Unions have a fundamental interest in industry promotion funds and that is why they commonly find their way into collective bargaining agreements.

IV. The Board Improperly Found that
the Local Restrained and Coerced
the Employer in the Selection of
its Bargaining Representative,
Within the Meaning of Section
8(b)(1)(B) of the Act

Section 8(b)(1)(B) reads: "(b) It shall be an unfair labor practice for a labor union or its agent... (1) to restrain or coerce...(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

The majority holding that an 8(b)(1)(B) violation exists in this case runs counter to the Board's decision in Sheet Metal Workers, Local 80, 161 N.L.R.B. 229 (1966). There, as in this matter, a local union was bargaining with an independent employer. The complaint alleged violations of Section 8(b)(3) and 8(b)(1)(B) of the Act in that Local 80 insisted, as a condition precedent to entering into a contract, that the contract contain provisions for an industry promotion fund. The Board dismissed the 8(b)(1)(B) aspect of the complaint. It said:

"We do not agree, however, with the General Counsel's contention that Respondent Local 80 also violated Section 8(b)(1)(B) of the Act by requiring T-B to accept an Industry Promotion Fund in which T-B would play no role in its administration. Admittedly, Respondent Local 80 insisted upon T-B's acceptance of these provisions however, mere insistence is not to be equated with the restraint and coercion

required by the statute to establish an 8(b)(1)(B) violation. Although the complaint alleges that Respondent Local 80 threatened to call a strike and did strike in support of its demand that T-B agree to the Industry Promotion Fund, the answers and stipulation admit only that Respondent Local 80 insisted upon the inclusion of these provisions in its contract with T-B. Thus, on the record before us, there is no evidence that Respondent Local 80 restrained and coerced T-B...." 161 N.L.R.B. at 235-236. (Emphasis supplied).

This case has never been reversed by the Board.

Local 80 actually engaged in a strike, yet the Board found that restraint and coercion were not established. In the instant matter, even accepting the Board's factual findings, there was, at most, a threat to strike. Yet, three Board members find restraint and coercion. The Board does not explain or distinguish; it simply ignores a prior published decision that is directly in point.

The Board's position also ignores prior Board and court decisions on the conduct intended to be remedied by Section 8(b)(1) of the Act. Chairman Fanning stated the position well in his dissent in Sheet Metal Workers Local 59, supra,

"The Board has long held that in the 8(b)(1) subsection of the Act, 'Congress was aiming at means, not at ends.' Perry Norvell Company, 80 N.L.R.B. 225, 239 (1948).

Thus, in interpreting Section 8(b)(1)(A), the Board with approval of the United States Supreme Court has held that 'Section 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof--conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.' (Emphasis supplied). N.L.R.B. v. Drivers, Chauffeurs, Helpers Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehouse men and Helpers of America (Curtis Bros., Inc.), 362 U.S. 274 (1960), citing National Maritime Union of America, Affiliated with the Congress of Industrial Organizations, 78 NLRB 971 (1948), enfd. 175 F.2d 686 (C.A.2, 1949); Local 74, United Brotherhood of Carpenters and Joiners of America, A.F. of L., et al. (Ixa A. Watson Company d/b/a Watson's Specialty Store), 80 NLRB 533 (1948), enfd. 181 F.2d 126 (C.A. 6, 1950) affd. 341 U.S. 707 (1951).

Inasmuch as the 'restraint and coercion' clause of Section 8(b)(1) applies to both Section 8(b)(1)(A) and 8(b)(1)(B), the Board under Section 8(b)(1)(B) as under Section 8(b)(1)(A), is limited to authority to proceed against union tactics involving 'violence, intimidation, and reprisal or threats thereof'." 94 L.R.R.M. at 1608.

The Board's findings of an 8(b)(1)(A) restrain and coercion violation is supported neither by the facts nor by prior Board or court precedent.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court deny enforcement of the Board's order.

Respectfully submitted,

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February, 1978.

A 201 Affidavit of Service by Mail
COURT OF APPEALS
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

ELMSFORD SHEET METAL WORKS, INC.,
- against -

SHEET METAL WORKINT. ASSOCIATION, LOCAL 38

Respondent.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF

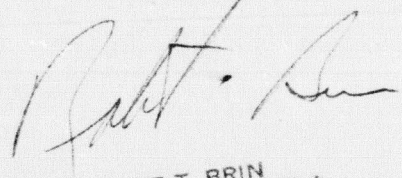
S.S.

I, **Robert Martinez** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1165 Morris Avenue; Bronx, New York
That on the **21st** day of **Feb.** **1978**, deponent served the annexed

~~Resp~~ **Resp Brief** upon **see attached** attorney(s) for
in this action, at **see attached**

the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this **21st**
day of **February**, **19 78**


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0118950
Qualified in New York County
Commission Expires March 30, 1979


Robert Martinez

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